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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1789

JACK P. ASHMORE, JR. and
R. WALTER ASHMORE, III,
Petitioners,
v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Supreme Court of Georgia in a case of first impression, holding that a Georgia statute dealing with the foreshore of navigable tidewaters granted only limited property rights

rather than fee simple title, operated to deprive petitioners of any property for public purposes without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

This case deals with conflicting claims to the foreshore of navigable tidewaters in Georgia. The foreshore is the strip of land lying between the high water mark and the low water mark of tidewaters, in this case the Atlantic Ocean. The Ashmores claim that they were conveyed fee simple title to the foreshore, including the right to exclude the public from walking along the foreshore, by a Georgia statute enacted in 1902. In a case of first impression, the Georgia Supreme Court held that the 1902 Act did not convey title to the foreshore of navigable tidewaters in Georgia to the adjacent upland owner but, rather, granted only the exclusive right to raise and harvest oysters and clams on the foreshore. (Petition, App., p. 21a).

This litigation commenced when the State of Georgia and Alva B. Lines, et al., filed suit against the Ashmores' predecessors in title disputing their right to develop condominiums on a thirteen-acre tract of accreted beach and sand dunes on St. Simons Island, Georgia. Both Lines, et al., owners of lots in a subdivision

landward of the accreted property in dispute, and the State claimed title to the property, and the State asserted that the public had the right to use the property as a public beach and park. Subsequent to the initiation of this litigation, the Ashmores were deeded the property in dispute by a deed which specifically recited that the conveyance was subject to this litigation.

In the superior court the Ashmores moved to dismiss the State's complaint for failure to state a claim upon which relief could be granted, and all parties filed motions for summary judgment. The superior court granted the Ashmores' motions and denied the motions of the State and Lines. (Petition, App., pp. 38a-40a). The State of Georgia and Lines appealed to the Supreme Court of Georgia. On February 24, 1976, the Supreme Court of Georgia reversed, ruling that the State of Georgia holds title to the foreshore of navigable tidewaters. The Supreme Court of Georgia also held that the accreted property had accrued to the owners of lots in the adjacent subdivision. The Ashmores' motion for rehearing was denied on March 11, 1976. (Petition, App., p. 1a).

The Petition for a Writ of Certiorari seeks review of the Georgia court's holding as to ownership of the foreshore; the Ashmores do not challenge the Georgia Supreme Court's holding that the upland

portion of the property in dispute belongs not to the Ashmores but to the owners of lots in the adjacent subdivision.

ARGUMENT

The Ashmores seek to have this Court review by certiorari a decision of the highest court of the State of Georgia construing a Georgia statute dealing with property rights in lands under navigable tidewaters. They have presented no valid reason why the United States Supreme Court should grant the writ of certiorari and, in fact, this case falls precisely within the category of cases in which the Supreme Court historically has deferred to the judgment of the state courts.

The state courts have the supreme power to interpret statutes of that state, and the United States Supreme Court will review decisions of state courts only when federal questions are presented. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930). This Court has repeatedly held that the courts of the various states are the final arbiter in conflicts arising under that state's property laws. This deference to the state courts is particularly appropriate in the case of disputes over lands lying beneath navigable waters. See Arkansas v. Tennessee, 246 U.S. 158, 176 (1918);

Hardin v. Jordon, 140 U.S. 371, 382 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1876).

While the decision of the Supreme Court of Georgia is of great significance to the litigants and to the property law of Georgia, it is based on a particular set of facts and a statute which is peculiar to the State of Georgia. There is no representation in the petition, nor can there be, that this factual setting and this statutory language exist in any other state. There is virtually no chance of repetition of these issues.

These is no discernible federal interest in the outcome of this dispute. This is not a case where one party claims property pursuant to a federal patent, as in Hughes v. Washington, 389 U.S. 290 (1967), or where the State claims the property under a federal constitutional or statutory provision, as in Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). And the petitioners have not cited any decision of this Court or any federal law with which the Georgia court's decision conflicts.

In a desperate attempt to have this Court overturn a decision of the Georgia Supreme Court with which they are displeased, the petitioners have invented a federal issue for this litigation by claiming that the decision below constitutes a taking of private property without

due process. This assertion is not supported by the record.

I.
THE DECISION BELOW PRESENTS NO SIGNIFICANT FEDERAL ISSUE

The Ashmores recognize, as they must, that ordinarily a decision of the Supreme Court of the State of Georgia construing and interpreting a Georgia statute is not reviewable by this Court. Aero Mayflower Transit Co. v. Board of R. R. Commissioners, 332 U.S. 495, 499-500 (1947). The fact that this Court would have decided the legal issue another way, or that the decision of the state court may in fact be erroneous as a matter of law does not confer jurisdiction upon the United States Supreme Court. "[I]t takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment." Seattle, R. and S. Ry. v. Washington ex rel. Linhoff, 231 U.S. 568, 570 (1913).

The Ashmores seek to bring this case within the ambit of the Fourteenth Amendment by asserting that the decision of the Georgia Supreme Court operates to take private property without compensation. They rest their argument for certiorari upon the concurring opinion of Justice Stewart in Hughes v. Washington, 389 U.S. 290, 294 (1967). It should be noted,

however, that the majority of the court in Hughes v. Washington held that title to the accreted property in dispute had to be determined pursuant to federal law because the petitioner's title derived from a federal patent prior to statehood. 389 U.S. at 291. The fact that the petitioner held title pursuant to a federal grant established a federal issue which is not present in the instant case. Moreover, the decision of the Washington court that littoral owners did not have title to the accretions to their property was in conflict with both the common law and the federal rule.

The concurring opinion of Justice Stewart in Hughes v. Washington focused on the fact that a 1946 opinion of the Washington Supreme Court had held that title to gradual accretions vests in the owner of the adjoining upland. 389 U.S. at 297. When the Washington court later held that the accretions to the property of Mrs. Hughes belonged not to her but to the state, there was presented an example of a state court decision which had the effect of taking for public purposes property which Mrs. Hughes justifiably had believed was hers.

The Georgia Supreme Court in the present case, in contrast, has followed clearly established principles of Georgia law in reaffirming the common law rule of

state ownership of the foreshore. It is clear that prior to 1902 the State of Georgia, like most of the original thirteen states, held title to the foreshore as successor to the rights of the King of England. Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902); accord, Shively v. Bowlby, 152 U.S. 1, 15 (1894). In Johnson v. State, supra, the Georgia Supreme Court reversed a conviction for taking oysters from an allegedly private oyster bed located between the high and low water marks of a tidal bay. The court held that the oyster bed was located on the State-owned foreshore and that therefore the taking of oysters was not a crime.

Shortly after the decision in Johnson v. State, the General Assembly enacted the statute on which the Ashmores base their claim of title to the foreshore. It is not disputed that the 1902 Act was adopted in response to the Johnson decision. However, the Ashmores disagree with the State and with the Supreme Court of Georgia as to the purpose and effect of the 1902 Act. The Georgia court held that the purpose of the 1902 Act was to give oystermen a property right in oyster beds, particularly oyster beds they had planted, so that they could legally protect the oyster beds from poachers.

Section 3 of the 1902 Act (Ga. Code § 85-1309), dealing with navigable tidewaters, nowhere states that it grants

title to the foreshore. Moreover, the 1902 Act was from the outset widely believed to be in violation of the Georgia Constitution's prohibition against gifts and donations. (Petition, App., p. 14a). The general belief in the unconstitutionality and therefore ineffectiveness of the 1902 Act is evidenced by the fact that a provision ratifying the 1902 Act was inserted into the new Georgia Constitution of 1945 and by the minutes of the Constitutional Commission which drafted the Constitution of 1945. (Petition, App., pp. 8a-10a, 14a). The effectiveness of the constitutional ratification of the 1902 Act was, however, also questioned. Op. Att'y Gen. 1970, p. 279 (Ga.).

Contrary to the Ashmores' contention (Petition, p. 8), the Georgia Supreme Court has never previously ruled on the interpretation or effectiveness of the 1902 Act. The Act was discussed peripherally in only a handful of decisions, and those statements of dicta are not inconsistent with the decision in this case.

Aiken v. Wallace, 134 Ga. 873, 68 S.E. 937 (1910), presented a dispute between private parties over ownership of the foreshore. The court specifically stated that a dispute between the state and a private property owner might lead to a different result and noted that the

1902 Act was not at issue in the case because of the prior state grant to the foreshore property in question.

Rauers v. Persons, 144 Ga. 23, 86 S.E. 244 (1915), was an action by the owner of St. Catherine's Island to enjoin the defendants from fishing in a navigable stream on the island; the court affirmed the refusal to grant the injunction. The court then went on, apparently gratuitously and on its own motion (Petition, App. pp. 21a-22a), to hold that the plaintiffs were entitled to "an injunction restraining the defendants from thus trespassing upon their land [above the low water mark] in the manner set out in the petition, and shown by the evidence." 144 Ga. at 25, 86 S.E. at 245 (emphasis added). However, such holding is not in conflict with the decision in the present case, for the evidence showed that the defendants, in fishing with gill nets on the foreshore, were disturbing the oysters and the plaintiff's oyster beds. Such activity was in conflict with the plaintiff's exclusive right to cultivate and harvest oysters on the foreshore in question. West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213 (1971), rev'd on other grounds, 228 Ga. 671, 187 S.E.2d 665 (1972), likewise does not support the Ashmores' contentions, for the Court of Appeals decision was reversed by the Georgia Supreme Court.

The decision of the Georgia Supreme Court in State v. Ashmore resolved a question of law which had been the subject of great uncertainty since 1902. The mere fact that the Ashmores' predecessors in title and other littoral property owners did not have their claims to the foreshore denied at an earlier date should not inflate their position with an undeserved equity. The Ashmores did not acquire their claim to the foreshore in question until after the initiation of this litigation, and the deed to them recites the pendency of this challenge to the title.

The decision of the Georgia Supreme Court in this case cannot be considered an unforeseeable change in the Georgia law of real property. The decision follows very closely Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902), which was the last time that the Georgia Supreme Court was presented with the issue of public versus private ownership of the foreshore of navigable tidewaters. Subsequent Georgia decisions are not inconsistent with this case. Nothing has been taken from the Ashmores, for they never owned the property in question and had no justifiable belief that they did. The decision of the Supreme Court of Georgia thus does not conflict with the Fifth and Fourteenth Amendments and this Court is urged to decline review thereof.

II.

THE DECISION BELOW IS CLEARLY CORRECT

In interpreting the 1902 Act the Georgia Supreme Court was guided by the general principle that a grant of rights in navigable waters must be strictly construed against the grantee and that nothing is taken by implication. (Petition, App., p. 21a). The language of the statute never mentions the word "title" to the foreshore of navigable waters and conveys only "rights". The court noted the contrast between Section 3 of the 1902 Act (Ga. Code § 85-1309) and Section 1 of that same statute (Ga. Code § 85-1307; Petition, App., p. 26a), which specifically deals with "title to the beds of nonnavigable tidewaters." The court held that the difference in wording between the two sections of the same statute evidenced the legislative intent that Section 3 grant something less than title. The statute itself reserved public rights to fishing, transportation and passage on the foreshore. Reading the statute strictly, the court held that the exclusive rights to cultivate and harvest oysters and clams were the only rights unequivocably conveyed by the statute.

In construing the 1902 Act the Georgia court also relied heavily on the purpose of the statute as indicated by

the court's decision in Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902), and the legislative history of the Constitution of 1945, which contains a provision ratifying the 1902 Act. The Johnson case, which prompted the 1902 Act, dealt with the right to cultivate oysters. Before the Constitutional Commission, it was again the needs of the oystermen which were emphasized. It is also noteworthy that the few decisions dealing with the foreshore in Georgia have almost uniformly arisen out of a conflict over fishing rights or oyster rights. See, e.g., West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213 (1971), rev'd on other grounds, 228 Ga. 671, 187 S.E.2d 665 (1972); Rauers v. Persons, 144 Ga. 23, 86 S.E. 244 (1915); Prey v. Oemler, 120 Ga. 223, 47 S.E. 546 (1904); Jones v. Oemler, 110 Ga. 202, 35 S.E. 375 (1900).

From all this evidence, the statutory language and the historical circumstances surrounding the 1902 Act, the Georgia Supreme Court carefully and correctly concluded that what the General Assembly intended by Section 3 of the 1902 Act was to grant the exclusive right to oysters and clams and nothing more. In reviewing the interpretation of a Georgia statute made by the Georgia Supreme Court, this Court has stated that it should reject a state supreme court's construction of a state statute only if

it is clear that the state legislature "by the words it used, could not have expressed the meaning thus attributed to it." Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168, 171 (1947). This Court should not review the careful construction of the 1902 Act made by the Georgia Supreme Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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